

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	
v.)	Case No. 1:17-cr-00224-AT-CMS
)	
ALLEN J. PENDERGRASS,)	
Defendant.)	

DEFENDANT’S REQUEST TO CHARGE¹

COMES NOW ALLEN PENDERGRASS, by and through undersigned counsel, and pursuant to Rule 30 of the Federal Rules of Criminal Procedure, hereby submits these requests to charge.

Mr. Pendergrass respectfully requests leave of the Court to allow the parties to propose additional pattern and/or special instructions as necessary at the close of the evidence.

Respectfully submitted this 24th day of November 2021.

/s/SARALIENE S. DURRETT

Saraliene S. Durrett
1800 Peachtree Street
Suite 300
Atlanta, GA 30309

/s/SYDNEY R. STRICKLAND

Sydney Rene Strickland
Strickland Webster, LLC
Suite 510-203, 830 Glenwood Ave., S.E.
Atlanta, GA 30316

¹ These requests are in addition to the government’s requests to charge that are based on the Eleventh Circuit Pattern Jury Instructions (Criminal Cases), which have previously been provided to the Court.

DEFENDANT'S REQUEST TO CHARGE NO. 1

**CONSIDERATION OF DIRECT AND CIRCUMSTANTIAL EVIDENCE;
ARGUMENT OF COUNSEL; COMMENTS BY THE COURT²**

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses, stipulations, and the exhibits admitted. But, anything the lawyers say is not evidence and is not binding on you.

You should not assume from anything I've said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters.

In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions. You should not be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness.

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There is no legal difference in the weight you may give to either direct or circumstantial evidence.

² Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction No. 4 (2020), with the addition of the word "stipulations."

DEFENDANT'S REQUEST TO CHARGE NO. 2

STIPULATION OF THE PARTIES³

In this case, the parties have entered into agreement as to certain facts — that is, they have agreed that certain things are true. These agreements are referred to as stipulations of fact. A stipulation of facts that the parties have agreed to is in evidence and you may have it with you during your deliberations. You should accept these stipulations as true without the need for further evidence of the facts stated.

In this case, the parties have stipulated that, in this case, the government represented in court documents that the specific counts alleged in the Indictment involve incidents where co-defendant McQueen, not Defendant Pendergrass, signed and sent the forged documents.

³ See *United States v. Delvalle*, 444 Fed. Appx. 336 (11th Cir. 2011) (where district court used similar stipulation language).

DEFENDANT'S REQUEST TO CHARGE NO. 3

**IMPEACHMENT OF WITNESS BECAUSE OF BAD REPUTATION FOR (OR
OPINION ABOUT) TRUTHFULNESS⁴**

There may also be evidence tending to show that a witness has a bad reputation for truthfulness in the community where the witness resides, or has recently resided; or that others have a bad opinion about the witness's truthfulness.

You may consider reputation and community opinion in deciding whether to believe or disbelieve a witness.

⁴ Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction No. 6.7 (2020).

DEFENDANT'S REQUEST TO CHARGE NO. 4

MAIL FRAUD⁵

It's a Federal crime to use the United States mail in carrying out a scheme to defraud someone.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant knowingly devised or knowingly participated in a scheme to defraud someone by using false or fraudulent pretenses, representations, or promises;
- (2) the false or fraudulent pretenses, representations, or promises were about a material fact;
- (3) the Defendant intended to defraud someone; and
- (4) the Defendant used the United States Postal Service by mailing or by causing to be mailed something meant to help carry out the scheme to defraud.

⁵ Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Offense Instruction No. 50.1 (2020), with the addition of the word “knowingly” prior to participated. *See United States v. Ward*, 486 F.3d 1212, 1222 (11th Cir. 2007) (“[A] defendant may be convicted of mail fraud without personally committing each and every element of mail fraud, so long as the defendant knowingly and willfully joined the criminal scheme”); *United States v. Sosa-Baladron*, 800 Fed. Appx. 313 (6th Cir. 2020) (“To prove mail fraud under 18 U.S.C. § 1341, the government must show that (1) the defendant knowingly participated in or devised a scheme to defraud in order to obtain money”); *United States v. Richards*, 204 F.3d 177, 207 (5th Cir. 2020)(same for wire fraud).

DEFENDANT’S REQUEST TO CHARGE NO. 5

MONEY LAUNDERING CONSPIRACY⁶⁷

It’s a Federal crime to conspire to engage in money laundering or transactions involving the proceeds of specified unlawful activity that violates Title 18, United States Code, Section 1956.

Title 18, United States Code, Section 1956 makes it a Federal crime to knowingly engage in certain kinds of financial transactions commonly known as money laundering. The elements of this offense are:

- (1) the Defendant knowingly conducted or tried to conduct, a financial transaction;
- (2) the Defendant knew that the money or property involved in the transaction were the proceeds of some kind of unlawful activity;
- (3) the money or property did come from an unlawful activity, specifically Mail Fraud, as alleged in Counts 1 through Five of the Indictment; and
- (4) the Defendant was involved in the financial transaction with the intent to promote the carrying on of that specified unlawful activity.

To “conduct a transaction” means to start or finish a transaction, or to participate in a transaction at any point.

⁶ Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Offense Instruction No. 74.5 (2020).

⁷ Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Offense Instruction No. 74.1 (2020).

To “know that the money or property involved in the transaction came from some kind of unlawful activity” is to know that the money or property came from an activity that’s a felony under state, federal, or foreign law. In this case, the unlawful activity is the mail fraud outlined in Counts 1 through 5 of the indictment.

The term “proceeds” means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of the activity

The term “with the intent to promote the carrying on of specified unlawful activity” means that the Defendant must have [conducted] [attempted to conduct] the financial transaction for the purpose of making easier or helping to bring about the “specified unlawful activity” as just defined.

A “conspiracy” is an agreement by two or more persons to commit an unlawful act. In other words, it is a kind of partnership for criminal purposes. Every member of the conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement. The heart of a conspiracy is the making of the unlawful plan itself, so the Government does not have to prove that the conspirators succeeded in carrying out the plan.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) two or more people agreed to try to accomplish a common and unlawful plan to violate 18 U.S.C. Section 1956; and
- (2) the Defendant knew about the plan's unlawful purpose and voluntarily joined in it.

A person may be a conspirator even without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan – and voluntarily joined in the plan on at least one occasion – that's sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. Also a person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.

DEFENDANT’S REQUEST TO CHARGE NO. 6

MULTIPLE CONSPIRACIES⁸

Proof of several separate conspiracies isn’t proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies proved is the single overall conspiracy.

You must decide whether the single overall conspiracy charged existed between two or more conspirators. If not, then you must find the Defendants not guilty of that charge.

But if you decide that a single overall conspiracy did exist, then you must decide who the conspirators were. And if you decide that a particular Defendant was a member of some other conspiracy – not the one charged – then you must find that Defendant not guilty.

So to find a Defendant guilty, you must all agree that the Defendant was a member of the conspiracy charged – not a member of some other separate conspiracy

⁸ Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Offense Instruction No. 013.3 (2020).

DEFENDANT’S REQUEST TO CHARGE NO. 7

AGGRAVATED IDENTITY THEFT⁹

It’s a Federal crime to commit aggravated identity theft.

The Defendant can be found guilty of aggravated identity theft only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant knowingly transferred, possessed, or used another person’s means of identification;
- (2) without lawful authority; and
- (3) during and in relation to Mail Fraud as alleged in Counts 1, 2, 4 and 5 of the indictment.

A “means of identification” is any name or number used, alone or together with any other information, to identify a specific person, including a name, social security number, date of birth, officially issued driver’s license or identification number, alien registration number, passport number, employer or taxpayer identification number, or electronic identification number or routing code. It can also include a fingerprint, voice print or other biometric data.

The Government must prove that the Defendant knew that the means of identification, in fact, belonged to another actual person, living or dead, and not a fictitious person.

⁹ Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Offense Instruction No. 74.5 (2020).

The Government must prove that the Defendant knowingly transferred, possessed, or used another person's identity "without lawful authority." The Government does not have to prove that the Defendant stole the means of identification. The Government is required to prove the Defendant transferred, possessed, or used the other person's means of identification for an unlawful or illegitimate purpose.

The Government also must prove that the means of identification was possessed "during and in relation to" the crime alleged in the indictment. The phrase "during and in relation to" means that there must be a firm connection between the Defendant, the means of identification, and the crime alleged in the indictment. The means of identification must have helped with some important function or purpose of the crime, and not simply have been there accidentally or coincidentally. The means of identification at least must facilitate, or have the potential of facilitating, the crime alleged in the indictment.

DEFENDANT’S REQUEST TO CHARGE NO. 8

GOOD-FAITH DEFENSE¹⁰¹¹

“Good faith” is a complete defense to a charge that requires intent to defraud. A defendant isn’t required to prove good faith. The Government must prove intent to defraud beyond a reasonable doubt.

An honestly held opinion or an honestly formed belief cannot be fraudulent intent – even if the opinion or belief is mistaken. Similarly, evidence of a mistake in judgment, an error in management, or carelessness can’t establish fraudulent intent.

But an honest belief that a business venture would ultimately succeed doesn’t constitute good faith if the Defendant intended to deceive others by making representations the Defendant knew to be false or fraudulent.

¹⁰ Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Special Instruction No. 17 (2020).

¹¹ *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981), failure to give this instruction as a theory-of-defense charge, when requested to do so, is error if there is any evidentiary foundation to support the Defendant’s claim. Note, however, that there must be some evidentiary basis for the request. If the usual instructions are given defining willfulness and intent to defraud, that will ordinarily suffice in the absence of evidence of good faith. *United States v. Boswell*, 565 F.2d 1338 (5th Cir. 1978), reh’g denied, 568 F.2d 1367 (11th Cir. 1978), cert. denied, 439 U.S. 819, 99 S. Ct. 81, 58 L. Ed. 2d 110 (1978); *United States v. England*, 480 F.2d 1266 (5th Cir. 1973), cert. denied, 414 U.S. 1041, 94 S. Ct. 543, 38 L. Ed. 2d 332 (1973); *United States v. Williams*, 728 F.2d 1402 (11th Cir. 1984).

DEFENDANT'S REQUEST TO CHARGE NO. 9

SIMILAR ACTS EVIDENCE¹²

During the trial, you heard evidence of acts allegedly done by the Defendant on other occasions that may be similar to acts with which the Defendant is currently charged. You must not consider any of this evidence to decide whether the Defendant engaged in the activity alleged in the indictment. This evidence is admitted and may be considered by you for the limited purpose of assisting you in determining whether the Defendant had the intent and knowledge necessary to commit the crime charged in the indictment.

¹² Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Special Instruction No. 4.1 (2020).

DEFENDANT’S REQUEST TO CHARGE NO. 10

EVIDENCE OF INTRINSIC ACTS¹³

During the trial, you heard evidence of acts allegedly done by the Defendant in connection with Quarterback Club, Weissman, Nowack, Curry, & Wilco, The Lee Family Trust, Holland and Knight, and Hemisphere, Inc.

These acts are not charged in the Indictment. You have been provided this information because the government believes these acts are intrinsic to the charged conduct, that is, that they are necessary to complete the story of the charged crimes. I caution you that the Defendant is on trial only for the specific crimes charged in the indictment. You’re here to determine from the evidence in this case whether the Defendant is guilty or not guilty of the specific crimes charged in the Indictment.

¹³ Modified using language from B10.2: Caution: Punishment (Single Defendant, Multiple Counts); *See also* government brief at Doc. 73 at 4, 17 (“As the Other Bad Acts by Defendant are intrinsic to the charged conduct and necessary to complete the story of the charged conduct, this evidence is not subject to Rule 404(b) analysis.”); (“Particularly in a fraud and conspiracy case such as here, evidence of the pattern of fraudulent activity in which Defendant, along with his co-conspirators, participated is admissible as intrinsic evidence subject to 404(b) because it is necessary to complete the story of the crime.”); (“This evidence is necessary to complete the story of the charged conduct and is, therefore, not subject to the 404(b) analysis.”).

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date electronically filed the foregoing requests to charge with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record:

All Defense Counsel

All AUSAs of record

Respectfully submitted this day 24th of November 2021.

/s/SARALIENE S. DURRETT

Saraliene S. Durrett

GA Bar No. 837897

1800 Peachtree Street

Suite 300

Atlanta, GA 30309

Counsel for Mr. Pendergrass